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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation,

Plaintiffs,

v.

RIMINI STREET, INC., a Nevada corporation; AND SETH RAVIN, an individual,

Defendants.

Case No. 2:10-cv-0106-LRH-PAL

ORACLE'S OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE EXPERT TESTIMONY OF ELIZABETH A. DEAN

PUBLIC REDACTED VERSION

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I. INTRODUCTION

Rimini's motion to exclude the expert testimony of Elizabeth A. Dean ("motion") does not challenge her qualifications or the appropriateness of the accepted damages methodologies she applies. Rather, Rimini hopes to prevent the jury from considering Oracle's primary damages claims by mischaracterizing her analyses and disputing the evidence that underlies Dean's calculations and expert opinions.

Despite Rimini's repeated assertion that infringement is only "alleged," a substantial amount of Rimini's infringement will be undisputed at trial. Rimini has waived its last defense to Rimini's extensive PeopleSoft infringement (Dkt. 599; Dkt. 527 at 59:25-60:1), which infected Rimini's largest and most profitable business line. Rimini's widespread infringement of Oracle's Database software is also established. Dkt. 476 at 9:9-11, 31:18-22 (detailing over 200 infringing copies of Oracle Database that Rimini used to service customers). As to this undisputed infringement, all that remains is to decide the damages.

The Court should reject Rimini's motion to exclude Dean's lost profit opinions for Rimini's disputed or undisputed copyright infringement liability. Under the guise of a *Daubert* challenge, Rimini seeks a ruling that Oracle cannot prove causation, as a matter of law. Defendants' Motion to Exclude Expert Testimony of Elizabeth A. Dean ("Mot.") 1:16-17, 3:19-20, 15:14-19:4. This is improper. *See Pierson v. Ford Motor Co.*, No. C 06-6503 PJH, 2008 WL 7084522, at *3 (N.D. Cal. Aug. 1, 2008) ("[t]he ultimate issue of causation is not appropriate for determination in a motion to exclude evidence"). Contrary to Rimini's assertions, extensive evidence establishes that Rimini's infringement *caused* Oracle to suffer the significant lost profits that Dean describes in her report. Oracle will present that evidence at trial, including through Dean's testimony.

Rimini's attack on Oracle's copyright lost profits mischaracterizes Dean's opinions. Rimini attacks a straw-man by claiming that Dean included *every* Rimini customer in her copyright lost profits measurement. That is false. Dean used Rimini's customer list as a starting point for calculating Oracle's lost profits, but removed customers to account for the customers that would have left Oracle for reasons unrelated to Rimini's infringement. Dean

employed an exhaustive causation analysis consistent with methodologies accepted by numerous courts.

Rimini broadly seeks to exclude "Dean's opinions on Oracle's lost profits" in the amount of $96.1 million (Mot. 1:16-18, 19:6-8), but ignores that her lost profits opinions include three distinct components: (1) $76 million in lost support profits related to PeopleSoft, J.D. Edwards, and Siebel customers who signed with Rimini; (2) $17.9 million in Database lost profits for Rimini's failure to pay Oracle for the Database software that Rimini infringed; and (3) $2.2 million in lost profits due to discounts that Oracle gave customers to prevent further defections to Rimini. Rimini offers *no argument* why the latter two lost profits measures should be excluded. Instead, it tries to sweep them in with its misguided attacks on Dean's largest copyright lost-profits opinion. Rimini will have an opportunity to challenge the weight of Dean's lost profits damages opinions at trial, but there is no proper legal basis to exclude them altogether.

Rimini also challenges Dean's application of income method and hypothetical license negotiation analyses to quantify the fair market value of the copyrighted PeopleSoft, J.D. Edwards, and Siebel materials that Rimini has infringed. Mot. 5:15-23. To streamline the issues for trial, Oracle has elected not to present these two damage opinions at trial (with the exception of Oracle Database damages discussed below). The issues raised by these opinions are thus moot.

II. DEAN'S COPYRIGHT DAMAGES OPINIONS

Rimini does not dispute Dean's qualifications to provide the opinions she has disclosed. Dean has a degree in Mathematics and Economics from Claremont McKenna College. Declaration of Nitin Jindal in Support of Oracle's Opposition to Defendants' Motion to Exclude Expert Testimony of Elizabeth A. Dean ("Jindal Decl."), Ex. B (Dean Schedule 1). She is a Certified Public Accountant, Certified Management Accountant, and Certified Licensing Professional. *Id.* She also is certified in Financial Forensics. *Id.* Dean has over 20 years of experience consulting on damages issues in a wide range of industries. *Id.* She has analyzed lost profits in over 100 cases and been accepted by numerous federal and state courts as a testifying

expert on intellectual property damages issues. *Id.*

In her 190-page expert report, Dean presents opinions regarding: (1) Oracle's claim for copyright infringer's profits; (2) violation of the federal Computer Fraud and Abuse Act; (3) violation of the California Computer Data Access and Fraud Act; (4) violation of Nevada Revised Statutes § 205.4765; (5) breach of contract; (6) inducement of breach of contract; (7) intentional interference with prospective economic advantage; (8) negligent interference with prospective economic advantage; (9) unfair competition; (10) trespass to chattels; and (11) unjust enrichment. Jindal Decl., Ex. A (Dean Rpt)., Tbl. 5. *None* of those eleven damages measures is the subject of Rimini's motion.

Dean also provides two alternative measures of Oracle's "actual damages" that resulted from Rimini's copyright infringement. 17 U.S.C. § 504(b). She measures Oracle's "actual damages" in the form of both Oracle's lost profits and a hypothetical license (which Oracle no longer is pursuing). Dean determines that Oracle suffered at least three forms of lost support profits as a result of Rimini's copyright infringement: $76.0 million in lost support profits related to PeopleSoft, J.D. Edwards, and Siebel customers who signed with Rimini; $17.9 million in Database lost profits for Rimini's failure to pay Oracle for the Database software Rimini infringed; and $2.2 million in discounts Oracle gave to prevent further defections to Rimini ("Siebel IAR" lost profits). Jindal Decl., Ex. A (Dean Rpt)., Tbl. 5.

A. Oracle's Lost Support Profits from Rimini's PeopleSoft, J.D. Edwards, and Siebel Customers

Dean performs a comprehensive analysis of the lost support profits that Oracle suffered due to Rimini's copyright infringement. She individually analyzes each of Rimini's 364 customers to determine the dates they started with Rimini, the products Rimini serviced, the dates they cancelled Oracle support, and how much each customer had paid Oracle for support of the same product. Jindal Decl., Ex. A (Dean Rpt.) ¶¶ 78-80. As described below, she then excludes 108 customers due to her determination that either Oracle did not suffer any lost support revenues related to them, or Oracle's copyright owner did not directly receive revenues related to their support contracts. Oracle's potential lost revenues are the amounts that each of

the remaining 256 customers would have paid Oracle to support their PeopleSoft, J.D. Edwards, and/or Siebel products had they never left for Rimini.

Dean then conducts an exhaustive causation analysis to determine what portion of Oracle's lost revenues was due to Rimini's copyright infringement. She considers how Rimini's infringement contributed to customers signing with Rimini. Specifically, Dean considers that Rimini "[redacted]." *Id.* ¶ 46. She also considers the analysis and opinion of Oracle's technical expert, Dr. Randall Davis, who concluded that [redacted]." *Id.* Thus, Dean opines that "[redacted]" *Id.* ¶ 56.

[redacted]. *Id.* ¶¶ 56-58. Based on her analysis of Rimini's financial position during the relevant years, Dean opines that [redacted]" *Id.* ¶ 138.

[redacted]. *Id.* ¶ 61.[1]

Dean then opines what these customers would have done absent Rimini's infringement.

[1] This conclusion is also supported by the customer analysis and opinions of Oracle industry expert Edward Yourdon. Jindal Decl., Ex. D (Yourdon Rpt.) ¶ 17 (Yourdon's Summary of Opinions). It is also supported by extensive evidence, including from the customers themselves. *E.g.*, *id.*, Ex. L (PTX 795) at 7 ([redacted]); Ex. P (customer [redacted] Dep.) 19:3-21:2.

As an initial step, Dean eliminates customers from the potential pool of lost customers if she determines that (a) Oracle's copyright plaintiff, Oracle International Corporation, would not have directly received a portion of the support revenues that the customer would have paid Oracle (these tended to be international customers), (b) the customer was paying Oracle for support at the same time period when it was with Rimini (i.e., the customer never cancelled Oracle support), or (c) the customer returned to Oracle support, in which case Dean assumes that, as part of the reinstatement with Oracle, the customer would have paid Oracle support fees for the time it was gone (this was a conservative assumption as customers did not always pay Oracle the full amount of back support). Jindal Decl., Ex. A (Dean Rpt.) ¶ 84. This results in the removal of 108 of the 364 potential lost profits customers. Jindal Decl., Ex. C (Dean Schedule 9).[2]

Dean then analyzes the other options that were available to customers besides Oracle and Rimini. Evidence from Rimini, Oracle, and the customers themselves shows that [redacted]. Jindal Decl., Ex. A (Dean Rpt.) ¶¶ 62-70.[3] Dean also determines that a [redacted]. Jindal Decl., Ex. G (Dean Dep. Ex. 5) at 4 ("[redacted]."); *see also id.* at 4-9 (explaining the basis for Dean's opinion that [redacted]).

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[2] The 108 excluded customers are those where the "Damage Category" on Dean's Schedule 9 is other than "Lost OKI" or "Lost Legacy," in addition to those customers who only received Rimini support for Oracle's JDE World software.

[3] This conclusion is also supported by the opinions of Oracle industry expert Edward Yourdon. Jindal Decl., Ex. D (Yourdon Rpt.) ¶ 17 (Yourdon's Summary of Opinions). It is also supported by extensive evidence, including from the customers themselves. *E.g.*, *id.*, Ex. M (Davichick Dep.) 50:17-20 [redacted] Ex. Q (customer Blue Cross and Blue Shield of Kansas City Dep.) 18:10-12.

With that background, Dean further reduces Oracle's potential lost copyright profits by Oracle's historical attrition rate to account for ordinary loss of customers. Jindal Decl., Ex. A (Dean Rpt.) ¶¶ 91-93. Oracle's historic attrition rate measures the customers that leave Oracle support every year, *for any reason*. Reasons customers leave Oracle support include because they no longer use the software (e.g., they have transitioned to SAP), they go bankrupt, they purchase support from Rimini or others, and other reasons. Jindal Decl., Ex. O (Catz Dep.) 44:22-45:8. For example, a 10% attrition rate means that in a given year, customers representing 10% of Oracle's support revenue cancel support for any reason.[4] Continuing with that example, if in 2009, Oracle lost $50 million in support revenues for customers that cancelled Oracle support and went to Rimini, and Oracle's attrition rate was 10% for that year, Dean reduces the $50 million in lost revenues by $5 million (10% of $50 million). The remaining $45 million would be reduced again in 2010 by Oracle's 2010 attrition rate (after accounting for additional losses from that year), and so on.

Applying the attrition rate in this manner has the effect of removing customers from Dean's lost profits measurement. It represents her opinion that, even if the customers at issue did not leave Oracle for an infringing Rimini in the but-for world, most would have stayed with Oracle, but some still would have left Oracle each year at rates consistent with Oracle's entire customer base. *Id.* ¶¶ 91-93.[5]

Dean determines that applying these attrition rates to account for lost customers in this context is conservative, as using Oracle's historic attrition rate likely overstates the proportion of Rimini customers that should not be included in her lost-profits calculations. For example, it includes customers who left for Rimini and TomorrowNow, another infringer that was in the market at the time. *Id.* ¶ 93. A true attrition rate for a world without infringement would not

[4] Over the relevant time period, Oracle's annual attrition rate for PeopleSoft, J.D. Edwards, and Siebel ranged from 3% to 9%. Dkt. 523 (Pretrial Order) at Undisputed Fact ¶ 34.

[5] This conclusion is also supported by the opinions of Oracle industry expert Edward Yourdon. Jindal Decl., Ex. D (Yourdon Rpt.) ¶ 17 (Yourdon's Summary of Opinions).

include such losses.[6] The attrition rate also includes losses of customers that exhibited characteristics unshared by Rimini's customers. For example, it includes losses of customers who stopped using Oracle's software. Jindal Decl., Ex. O (Catz Dep.) 44:22-45:8. An attrition rate more tailored to Rimini's customer base would not have included such losses.

As a final step, Dean determines which portion of each customer's revenues lost to Oracle would have been received by the Oracle entity that owns Oracle's copyrighted software. Jindal Decl., Ex. A (Dean Rpt.) ¶¶ 101-103, 108-11. That entity, Oracle International Corporation, receives 39% of each support dollar Oracle earns. *Id.* Thus, Dean reduces Oracle's claimed lost revenues by 61%. *Id.* She then applies Oracle International Corporation's profit margin to her measurement of relevant lost revenues, and determines that Rimini's copyright infringement caused Oracle $76 million in lost profits related to Rimini's PeopleSoft, J.D. Edwards, and Siebel customers. *Id.*; *see also* Jindal Decl., Ex. F (Dean Dep.) at 96:16-23 ([redacted]").

B. Oracle's Database Damages

For actual copyright damages related to Rimini's infringement of Oracle Database, Dean bases her calculation of Oracle's lost profits on the public list price that Oracle uses for customers who wish to purchase a standard Database license. Jindal Decl., Ex. A (Dean Rpt.) ¶¶ 117-119. Rimini's damages expert, Scott Hampton, also [redacted]. Jindal Decl., Ex. E (Hampton Rpt.) ¶¶ 153-154.

Oracle's list price depends on the number of processors in the servers the customer uses

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[6] *See Polaroid Corp. v. Eastman Kodak Co.*, No. 76-1634-MA, 1990 WL 324105, at *13 (D. Mass. Oct. 12, 1990) *amended*, No. CIV.A. 76-1634-MA, 1991 WL 4087 (D. Mass. Jan. 11, 1991) (when calculating lost profits, "[t]he inquiry [into substitutes] is quite narrow; acceptable substitutes are those products which offer the key advantages of the patented device *but do not infringe*") (emphasis supplied); *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1578 (Fed. Cir. 1989) (if the other suppliers "were likely infringers," patent holder would have been entitled to their shares of the market in determining damages based on lost sales); *cf. Pall Corp. v. Micron Separations*, 66 F.3d 1211, 1222 (Fed. Cir. 1995) (a "voluntary settlement of litigation does not retrospectively transform an accused infringing product into a 'noninfringing substitute'" that is relevant to lost profits).

with the software. Jindal Decl., Ex. A (Dean Rpt.) ¶¶ 117-119. For example, starting in December 2008, Oracle's list price for a Database Enterprise Edition license was $47,500 per processor. *Id.* A customer must purchase a separate license for each "business operation" that benefits from use of the software. *Id.* [redacted] *Id.*[7] [redacted] *Id.* After she adds fees for Oracle support and deducts 5% for the costs Oracle would incur to sell Rimini the licenses, Dean determines that Rimini would have paid Oracle $17.9 million in total Database license fees based on its actual use of the software. *Id.* ¶ 121.

Alternatively, Dean measures Oracle's actual copyright damages for infringement of Oracle Database by determining *the value of Rimini's use* of Oracle's copyrighted database materials. Jindal Decl., Ex. A (Dean Rpt.) ¶ 377. She uses Oracle's standard database license, discussed above, as the relevant "benchmark license" that would be used in a hypothetical negotiation to license Rimini's infringing conduct from the date of its first infringement (Oct. 2006) through 2012. *Id.* ¶¶ 352, 360-363, 372-375. Dean's hypothetical license negotiation analysis values Rimini's use of Oracle Database at $17.9 million: the same amount as Oracle's Database lost profits. *Id.* ¶ 380.

C. Siebel IAR Lost Profits

Dean also calculates lost profits that Oracle suffered with respect to customers that never left Oracle to join Rimini. Oracle's policy is to increase its customers' support fees every year by an inflationary adjustment of 3%. Jindal Decl., Ex. A (Dean Rpt.) ¶ 123. After Oracle acquired Siebel Systems, Inc. in 2006, Oracle decided to increase Siebel support customer fees by 4-5%, depending on whether the Siebel support contract was for gold or standard support.

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[7] [redacted] Jindal Decl., Ex. E (Hampton Rpt.) ¶ 154.

Id. ¶ 124. The increased adjustment was to account for the fact that Siebel's support contracts were priced at 15.8% and 17.5% of the initial license price, whereas Oracle's policy was to price support at 22% of license price. *Id.* ¶ 123.

In October 2009, Rimini's infringement caused Oracle to reduce its Siebel 4-5% inflationary increases to 3%. *Id.*; Jindal Decl., Ex. K (PTX 769) (October 2009 Oracle email chain describing decision to reduce inflationary increase in response to Rimini). Specifically, Rimini's 50% price on Siebel support, which was made possible by Rimini's infringement (as described above), caused Oracle to reduce the increase it had employed for three years to avoid losing additional customers to Rimini. *Id.* Dean calculates the amount of this decrease and determines that Oracle lost an additional $2.2 million in profits as a result. Jindal Decl., Ex. A (Dean Rpt.) ¶¶ 126-128.

III. LEGAL STANDARD

Under Federal Rule of Evidence 702, a qualified expert may testify in order to assist the trier of fact to understand the evidence or to determine a fact in issue if (i) the testimony is based on sufficient facts or data, (ii) the testimony is the product of reliable principles and methods, and (iii) the witness has applied the principles and methods reliably to the facts of the case. The Supreme Court established a framework for the admissibility of expert testimony under Federal Rule of Evidence 702 in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The Supreme Court listed four factors that courts may consider in determining whether expert testimony is admissible: (1) whether the method has gained general acceptance in the relevant scientific community; (2) whether the method has been peer-reviewed; (3) whether the method "can be (and has been) tested;" and (4) whether there is a "known or potential rate of error." *Daubert*, 509 U.S. at 593-94.

When evaluating the admissibility of expert testimony, the overarching concern is whether it is relevant and reliable. *Daubert*, 509 U.S. at 594-95. Reliability is determined based on the soundness of the methodology, not the expert's ultimate conclusions. *Kennedy v. Collagen Carp.*, 161 F.3d 1226, 1230-31 (9th Cir. 1998) (courts should not exclude expert testimony because they disagree with their conclusions). When the threshold for admissibility

is met, differences in the experts' opinions go to weight, not admissibility. *Id.* "[T]he rules of evidence do not demand perfection. Rather, a court need only determine whether the reasoning and methods underlying the expert testimony are reliable, and whether they have been properly applied to the facts." *Gutierrez v. Wells Fargo & Co.*, No. C07-05923 WHA, 2010 WL 1233810, at *11 (N.D. Cal. Mar. 26, 2010). "When the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility." *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir. 2010), *aff'd on other grounds*, 131 S. Ct. 2238 (2011). "Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Fresenius Med. Care Holdings, Inc. v. Baxter Int'l, Inc.*, No. C 03-1431 SBA, 2006 WL 1390416, at *3 (N.D. Cal. May 18, 2006).

IV. DEAN'S LOST PROFITS DAMAGES OPINIONS ARE ADMISSIBLE.

Rimini claims that Dean's copyright lost profits opinion should be excluded because she "fails to establish any 'causal link'" between Rimini's infringement and her lost profits calculations. Mot. 3:19-20. Rimini ignores the extensive analysis Dean completed, ignores the substantial evidence supporting her opinion, relies on gross mischaracterizations of her analysis, and argues about specific facts that go to the weight, not admissibility, of her opinions. Further, Rimini does not even attempt to explain why Dean's Database and Siebel IAR lost profits opinions should be excluded.

A. Dean's Lost Profits Opinions Are Admissible and Are Supported by Analysis and Evidence on Causation.

It is Oracle's burden only to prove the lost profits it suffered "as a result of the infringement." 17 U.S.C. § 504(b); *Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004). Oracle must prove "with reasonable probability the existence of [a] causal connection between the infringement and a loss of revenue." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 567 (1985). The burden then "properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted

expression." *Id.*; *see also Stevens Linen Assocs., Inc. v. Mastercraft Corp.*, 656 F.2d 11, 15 (2nd Cir. 1981) (where plaintiff lost sales to infringer, "once [plaintiff] established that it had been damaged, and that its customers purchased both the infringed and infringing products, the burden shifted to the infringer . . . to prove that the customers . . . to whom it sold would not have acquired from [plaintiff] alone [the products at issue] had there been no infringement").[8] "Courts and commentators agree [that the term 'actual damages'] should be broadly construed to favor victims of infringement." *On Davis v. The Gap Inc.*, 246 F.3d 152, 164 (2d Cir. 2001) (citing sources); *Stevens Linen Assocs.*, 656 F.2d at 15 (where two measures of actual damages were available, district court instructed to "award [plaintiff] whatever sum proves to be greater").

Rimini takes no issue with Dean's methodology under *Daubert*, nor could it. Instead, Rimini improperly seeks a determination of the ultimate factual issue of causation. *See Pierson*, 2008 WL 7084522, at *3 (rejecting motion seeking to exclude expert testimony based on a claim that expert did not satisfy plaintiff's causation burden: "[t]he ultimate issue of causation is not appropriate for determination in a motion to exclude evidence"); *IGT v. Alliance Gaming Corp.*, No. 2:04-1676-RCJ-RJJ, 2008 WL 7084605, at *9 (D. Nev. 2008) (it is "inappropriate for a motion *in limine*" to decide "questions of fact"). Rimini's motion should be denied on that basis alone, as the relevant question is whether Dean's opinion is admissible to help Oracle meet its burden of proof, not whether Oracle has already met it before trial even begins.

Rimini also ignores that Dean completes a comprehensive lost profits and causation analysis. Specifically, Dean opines that the customers at issue – which provide the starting point for her lost profits analysis – needed a provider to provide support services for the copyrighted software, as evidenced by their purchase of support services from Rimini. Jindal

[8] Rimini wrongly implies that Oracle's burden is to provide a lost profit calculation that satisfies a "but for" test, but the error is of no consequence to Rimini's motion. Dean analyzes Oracle's lost profits from both perspectives. *See* Section II(A); *see also* Jindal Decl., Ex. F (Dean Dep.) 93:3-9 ("it is my opinion that [the lost profits she calculated] are the amount of revenues that Oracle would have made, but for Rimini's infringement").

Decl., Ex. A (Dean Rpt.) ¶ 70. She then analyzes evidence showing that Rimini's infringement was extensive, necessary for Rimini's support offering, provided Rimini with significant efficiencies, and allowed Rimini to offer Oracle's customers the same service as Oracle at 50% of Oracle's price. *See* Section II(A) (summarizing Dean's lost profits analysis).

Rimini also disregards the fact that Oracle will present substantial evidence at trial to support these bases of Dean's opinion. The analysis of Oracle's technical experts, Christian Hicks and Dr. Randall Davis, establishes that Rimini's infringement was extensive. Jindal Decl., Ex. A (Dean Rpt.) ¶ 46. Documents and testimony confirm that Rimini's [redacted] For example, Rimini has stated that it "[redacted]" Jindal Decl., Ex. H (PTX 11). [redacted] *Id.* Rimini also considered it "[redacted] Jindal Decl., Ex. I (PTX 60). Substantial evidence will prove that [redacted] Jindal Decl., Ex. J (PTX 740) at 2; *see also id.*, Ex. R (customer CKE Dep.) 46:16-24 (CKE evaluated whether Rimini could provide tax updates when deciding whether to sign with them); Ex. S (customer Hastings Dep.) 79:15-21 (customer could not self-support because creating updates was "beyond [its] expertise"). Dean similarly relies on Oracle's technical and industry experts' analysis, plus Rimini documents and testimony, to confirm the [redacted] Jindal Decl., Ex. A (Dean Rpt.) ¶¶ 56-58, 61, 138 (citing discussions with Dr. Davis and Mr. Yourdon, internal Rimini communications and presentations, and Rimini executives' deposition testimony). Rimini's Senior Vice President of Global Sales identified Rimini's "[redacted]" as one of Rimini's "[redacted]." Jindal Decl., Ex. N (Maddock Dep.)

13:16-22, 14:20-15:2. The Court has already confirmed the service they stayed for was infringing. Dkts. 474, 476. Dean's extensive analysis and the supporting evidence at trial will thus establish "with reasonable probability the existence of [a] causal connection between [Rimini's] infringement and a loss of [Oracle] revenue." *Harper*, 471 U.S. at 567.

Dean goes even further, and analyzes Rimini's burden on causation: whether Oracle's losses "would have occurred had there been no taking of copyrighted expression." *Id.* Here, she again relies on significant evidence showing what Rimini's customers would have done absent Rimini's infringement. She examines the availability of non-infringing substitutes, and determines [redacted]. *See* Section II(A) (discussing Dean Rpt. ¶¶ 62-70). In addition to internal Rimini documents and third-party analyst reports, Dean cites customer testimony that confirms "[redacted]" and that customer "[redacted]." Jindal Decl., Ex. A (Dean Rpt.) ¶¶ 66, 70 (citing deposition testimony from customers Blue Cross and Blue Shield of Kansas City, Bausch & Lomb, CKE, and SonicWall). As described in Section II(A), Dean also uses Oracle's attrition rate to reduce Oracle's potential lost profits to account for the fact that, each year when a customer's support contract was up for renewal, a percentage of those customers would have chosen not to purchase support from Oracle (including because of potential non-infringing alternatives). Dean confirms that Oracle had the capacity to provide support services to these customers. Jindal Decl., Ex. A (Dean Rpt.) ¶ 76 (noting that Oracle previously supported the customers at issue, the size of Oracle's large customer base and high retention rates, and Oracle's continuous investments in its support infrastructure). Finally, Dean calculates the amount of the lost profits associated with these customers. *See* Section II(A).

Circuit courts have upheld damages awards based on lost profits opinions that closely resembled Dean's lost profits analysis. In *Oracle Corp. v. SAP AG*, 765 F.3d 1081 (9th Cir. 2014), the Ninth Circuit held that the district court abused its discretion when it set a remittitur amount using the lower of two lost-profits figures that Oracle's expert presented. *Id.* at 1094-95. The Ninth Circuit held that the district court should have selected a remittitur amount based

on "the highest lost-profits . . . estimate[] sustainable by the proof." *Id.* at 1095. Like Dean's, that lost-profits opinion embraced by the Ninth Circuit was based on Oracle's expert's valuation of customer support revenues that Oracle lost due to a competitor's widespread copyright infringement, which had enabled that competitor to offer competitive support offerings to customers at 50% of Oracle's price. Jindal Decl., Ex. U (*Oracle v. SAP* Joint Trial Exhibit 3, detailing scope of infringement); Ex. V (*Oracle v. SAP* Trial Tr.) at 1053:7-1054:4, 1054:17-23, 1055:7-1056:5, 1058:25-1059:5, 1059:13-1060:7 (describing that both parties' experts measured lost profits based on customers lost from Oracle to infringer), 1105:23-1106:7 (summarizing business model that led to Oracle lost profits).

Similarly, in *Data General Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994), the plaintiff's lost profits were based on the "loss of a reasonably verifiable number of customers" who, as here, purchased infringing services from defendant instead of plaintiff. *Id.* at 1173. The customers "may have switched to [defendant] in search of lower prices and better service," but there was evidence that defendant's drawing power was due to infringement. *Id.* The customers had a "limited and predictable set of service needs and a demonstrated tendency to satisfy those needs by turning to" defendant for their service. *Id.* Although the defendant offered non-infringing services as well, the infringement "was the critical attribute" of the service. *Id.* at 1172. Like Dean, the expert in *Data General* "did not presume that customers would be entirely insensitive to issues of price and quality. In calculating [plaintiff's] lost profits, he reduced the figure by an estimate of the business [the plaintiff] would itself have lost to competition" from other third party providers. *Id.* at 1173.

Like the lost profits opinions upheld in *Oracle v. SAP* and *Data General*, Dean's opinion is admissible and sufficient to support a damage award.[9] *i4i Ltd. P'ship*, 598 F.3d at

[9] Rimini likens Dean's causation analysis to a damages opinion that was rejected in *Dash v. Mayweather*, 731 F.3d 303 (4th Cir. 2013), but *Dash* is not even a lost profits case, and the damages opinion was rejected for a reason unrelated to causation. In *Dash*, the expert opined that the plaintiff was entitled to "actual damages" in the form of a lost license fee for use of the plaintiff's copyrighted song at two professional wresting events. The expert opined that, based on "what a willing buyer would have been reasonably required to pay to a willing seller for [the] plaintiffs' work," plaintiff was entitled to a $3,000 license fee. *Id.* at 314. The Fourth Circuit

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852 ("When the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility.").

B. Rimini's Challenges Rely on Mischaracterizations of Dean's Opinions and the Relevance of Facts That, at Best, Go to the Weight of Her Opinions.

Rimini's argument that there is no causal connection between Rimini's infringement and Dean's measured damages relies on a mischaracterization of Dean's lost profits opinion and complaints about disputed facts. Rimini wrongly claims that Dean's "fundamental underlying assumption concerning causation [is] that any lost customer is attributable to infringement." Mot. 19:1-2. This argument is unsupported.

Dean does *not* opine that Oracle is entitled to lost profits for every Rimini customer. To the contrary, she appropriately accounts for customers that might have left Oracle irrespective of Rimini's infringement. As described in Section II(A), Dean uses Oracle's attrition rate to effectively remove customers from her lost profits measurement and account for customers that would have left Oracle for reasons unrelated to infringement. If anything, Dean's use of the Oracle's historic attrition rates overestimates what those losses would have been, resulting in a damages number that is lower than Oracle's actual lost profits. In any case, any complaints about the attrition rate that Dean used go to the weight of her opinion. *Sun Microsystems, Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166, 1208-09 (N.D. Cal. 2009) ("to the extent that defendants challenge the accuracy or propriety of [inputs in the expert's model], it is an issue that goes to the weight, rather than the admissibility"). And even if the jury finds any of Rimini's fact-based challenges persuasive and that the scope or impact of Rimini's infringement differs from Dean's stated assumptions, Dean's comprehensive schedules and analysis make it possible to apportion Oracle's claimed damages based on applicable product

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affirmed the district court's ruling on summary judgment that plaintiff was not entitled to the fee, as a matter of law, because there no evidence that "that the thing taken had a fair market value." *Id.* at 318. The plaintiff had never "sold or otherwise garnered some market value for the use of his music." *Id* at 319.

lines, years, or customers.

Rimini also argues that Dean's "assumptions are also flatly contradicted by the evidence" because Rimini thinks testimony from customers Pitney Bowes and Bausch & Lomb show they should not have been included in any lost profits claim. Mot. 18:15-26. First, Rimini ignores other contrary testimony from these customers. Pitney Bowes testified that it [redacted]" Jindal Decl., Ex. T (Pitney Bowes Dep.) 15:8-16:19. Moreover, Pitney Bowes and Bausch & Lomb's choice to purchase support from Rimini shows they wanted a support provider. Finally, Dean's use of Oracle's attrition rate accounts for customers that might not have stayed with Oracle absent Rimini's infringement. Rimini's complaints "go to the *weight*, not the admissibility" of Dean's opinion. *Kennedy v. Collagen Corp.*, 161 F.3d at 1230-31; *DSU Med. CO/po v. JMS Co., Ltd.*, 296 F. Supp. 2d 1140, 1147-48 (N.D. Cal. 2003) ("it is not the role of the trial court to evaluate the correctness of facts underlying one expert's testimony," "an expert may testify on his party's version of the disputed facts," and the proper way to address factual disputes is through cross-examination).

Rimini misstates Dean's opinion by claiming that she "acknowledges that she cannot determine which of Oracle's lost revenues are due to infringement." Mot. 17:17-19. Rimini cites to Dean's report where she states that "[d]ue to the difficulty (or inability) in determining *every instance* where Rimini Street's actions have caused customers to not license products or buy support or other services from Oracle, or have otherwise caused Oracle harm, the 'Value of Use' measurement provides a more complete remedy for Oracle in this case." Jindal Decl., Ex. A (Dean Rpt.) ¶ 44 (emphasis supplied). In that paragraph, Dean explains that Oracle has incurred losses *beyond* what she has calculated as lost profits, and that it is not possible to calculate all other forms of Oracle's losses. Dean even provides examples of the losses that she did not quantify, and therefore, did not include in her damages analysis. *Id.* ¶¶ 71-75 (Dean's lost profits measure is "conservative" because she did not measure lost profits resulting from

damaged customer relationships or discounts given to customers to prevent additional customer defections). Her inability to calculate *every instance* of profits Oracle lost is the reason she opined that her hypothetical license analysis provided Oracle with a "more complete remedy." *Id.* ¶ 44. She never said that the lost profits *she did measure* were not the result of Rimini's infringement; she said the opposite. Jindal Decl., Ex. F (Dean Dep.) at 93:3-9 ("[redacted]").

Rimini's two other arguments have no bearing on the admissibility of Dean's lost profits opinions. First, Rimini repeatedly tries to confuse Oracle's claim for lost profits with a claim for infringer's profits under 17 U.S.C. 504(b),[10] asserting Oracle must prove "a causal link between the alleged infringement and the enhancement of any revenue stream." Mot. 15:24-27 (quoting *Dash*, 731 F.3d at 309). *Dash* was describing the standard for claiming an *infringer's* profits, not a plaintiff's *lost* profits. Rimini also makes this mistake with factual arguments, as it claims that the amount of money *Rimini made* is somehow relevant to *Oracle's losses*. Specifically, Rimini claims that Dean's lost profits opinion wrongly "assumes that any revenue Rimini Street made, or projected it would make, is 100% attributable to infringing activities." Mot. 16:12-14; *see also id.* at 18:7-9 (Dean's "inclusion of all Rimini Street revenues could withstand the causation standard identified above only if all of Rimini Street's support services were infringing.").[11] Rimini also argues that "the majority of Oracle's non-renewing customers

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[10] *See also Polar Bear*, 384 F.3d at 707-8 ("Congress explicitly provides for two distinct monetary remedies—actual damages and recovery of wrongful profits. These remedies are two sides of the damages coin—the copyright holder's losses and the infringer's gains. Actual damages are usually determined by the loss in the fair market value of the copyright, measured by the profits lost due to the infringement or by the value of the use of the copyrighted work to the infringer. To take away incentives for would-be infringers and to prevent the infringer from unfairly benefitting from a wrongful act, the statute also provides for the recovery of wrongfully obtained profits resulting from the infringement.") (internal quotations and citations omitted).

[11] Notably, in estimating Rimini's infringer's profits, [redacted]. Jindal Decl., Ex. E (Hampton Rpt.) ¶¶ 247-260.

left for reasons entirely unrelated to Rimini," based on the fact that [redacted], whereas Oracle's revenue attrition totaled $357 million during that period. Mot. 17:5-13. The revenues that Rimini made from its infringement are not the same as Oracle's claim for lost profits, particularly because Rimini's primary selling point is that it offers support for [redacted] less than Oracle charges. For example, the profits Rimini caused Oracle to lose would be the same if Rimini charged the same price as Oracle, 50% of Oracle's price, or if Rimini gave away its infringing service for free. Any arguments regarding Rimini's revenues are irrelevant to the admissibility of Dean's lost profits analysis.

Second, Rimini argues that Oracle's attrition rates improved after Rimini entered the market, as if Rimini *helped* Oracle's business. Mot. 16:16-17:4. Rimini ignores that without its infringing service in the market, Oracle's attrition rates would have been even lower than they were from 2006-2011. Rimini can advance fact-based criticisms through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof," *Daubert*, 509 U.S. at 596, but it does not render Dean's lost profits opinions inadmissible.

C. Dean's Database and Siebel IAR Lost Profits Opinions Are Admissible.

Although Rimini broadly seeks to exclude all of Dean's lost profits opinions, Rimini makes no specific claim, and presents no arguments, that Dean's Database and Siebel IAR lost profits opinions should be excluded for any reason. Both are admissible. *See* Sections II(B)-(C) (describing Dean's methodology and evidence supporting how Rimini's infringement caused claimed damage).

V. DEAN'S DATABASE VALUE OF USE DAMAGES OPINION IS ADMISSIBLE.

Rimini claims that Dean's fair market value opinions for the infringed PeopleSoft, J.D. Edwards, and Siebel materials are speculative and unreliable, but Rimini's motion offers no basis to exclude Dean's value of use opinion related to Rimini's infringement of Oracle Database. Mot. 5:15-21; Mot. Sections III(A)-(D). Rimini's motion literally does not discuss Dean's Database value-of-use opinion at all.

Rimini challenges Dean's hypothetical license calculations with respect to PeopleSoft, J.D. Edwards, and Siebel as unduly speculative because she does not rely on applicable

benchmark licenses. Mot. 5:24-8:6 (citing *Oracle Corp. v. SAP AG*, 765 F.3d 1081 (9th Cir. 2014)). Whatever the merits of this argument, the lack of benchmark licenses clearly does not apply to Dean's Database opinion, and Rimini is silent concerning this benchmark. Dean identifies Oracle's standard Database license fee (as set forth in Oracle's price list) as the applicable "benchmark license," and she uses it as the foundation of Oracle and Rimini's hypothetical license negotiation. *See* Section II(B). Rimini neither acknowledges nor disputes this in its motion. Nor does Rimini challenge the reliability of that license fee as a relevant benchmark. Rimini's own damages expert [redacted] Jindal Decl., Ex. E (Hampton Rpt.) ¶ 154. Even if Rimini's motion could be read to include a challenge to Dean's Database value of use opinion, Dean's hypothetical license negotiation analysis is based on an objective, non-speculative benchmark license.

VI. CONCLUSION

For the reasons stated above, Rimini's motion to exclude the expert testimony of Elizabeth A. Dean should be denied.

DATED: June 22, 2015

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